STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 81, LOCAL 459, Petitioner,	)	U.L.P. No. 96-03-174
v.	)	
NEW CASTLE COUNTY, Respondent.	)	

BACKGROUND

The American Federation of State, County and Municipal Employees, Council 81, Local 459 ("AFSCME" or "Union") is an employee organization within the meaning of Section 1302(h) of the Public Employment Relations Act ("PERA"), 19 Del.C. Chapter 13 (1994). AFSCME is the exclusive bargaining representative of employees in New Castle County within the meaning of Section 1302(i).

New Castle County ("County") is a public employer within the meaning of Section 1302(m) of the PERA.

FACTS

The Union and County are parties to a collective bargaining agreement for the period April 1, 1994 to March 31, 1997. [1] Contained in the Agreement is a four (4) step grievance procedure culminating in binding arbitration.

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[1] This agreement was executed by representatives of the parties on February 27, 1996. Section 121 of this agreement provides that its terms were retroactively effective on April 1, 1994. The County and AFSCME were parties to a predecessor agreement with a term of February 18, 1992 through March 31, 1994. All material portions of the grievance procedure provisions of these agreements are identical.

On May 1, 1991, the County advised the Union that it was revising the class specifications of certain classifications by requiring that certain employees possess a valid Commercial Driver's License ("CDL") by April 1, 1992. Thereafter, periodic communication occurred between the parties concerning the new requirement and its impact upon the pay grade of the affected employees.

On June 29, 1993, the Union filed the following system-wide grievance alleging a violation of Section 44 (a) and (b), of the collective bargaining agreement.

> On May 17, 1993, the Union grievance chairman responded to the Director of Personnel concerning his letter of April, 1993 about CDL license. At that time the Union requested a classification review. As of this date we still have not had your response. Remedy Sought: Negotiate a new rate of pay for classes involved.

The grievance was heard at Step Two of the grievance procedure on September 9, 1993. The Step Two answer dated September 16, 1993, provides:

> A license above and beyond the regular driver's license has always been required for these classifications. The CDL is a change, at the national level, to the type of license required which replaced the original Class B and C licenses. It is not a substantial change to the duties and responsibility of these class specifications.

On February 27, 1996, the Union appealed the grievance to Step Three of the grievance procedure which provides for a hearing before a Hearing Officer. [2]

In a decision dated March 11, 1996, the Hearing Officer rejected the County's argument that the grievance was not timely filed under Section 12 of the contractual grievance procedure. Concerning the underlying substantive issue, the Hearing Officer found that the CDL requirement constituted a substantial change in the class

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[2] Section 14(d) of the parties collective bargaining agreement provides:

> The County shall appoint the Hearing Officer. The Union shall have the right to disapprove of the person appointed by the County. If the Union disapproves, the County shall continue to appoint persons until such time as an individual is appointed who meets with the Union's approval. The Hearing Officer shall serve for one year at which time the Hearing Officer must be reappointed or replaced with the Union having the same right of disapproval.

specifications involved and awarded a one (1) pay grade increase for the affected classifications retroactive to July 28, 1992, the effective date of the requirement.

On March 15, the County advised the Union that it was appealing the decision of the Hearing Officer to arbitration.

On March 20, 1996, the Union filed an unfair labor practice charge with the Public Employment Relations Board ("PERB") alleging that because the decision by the Hearing Officer is final and binding upon the parties, the County's failure to comply with the Hearing Officer's decision constitutes a per se violation of 19 Del.C. §1307(1) and (5).

On March 29, 1996, the County filed an action in Chancery Court requesting that the Court vacate the Hearing Officer's award or, in the alternative determine, that his decision is appealable to arbitration.

On May 1, 1996, the County appealed the decision to arbitration protesting the Hearing Officer's decision as to both the timeliness of the grievance and the merits of the underlying substantive issue. On May 13, 1996, the Union advised the American Arbitration Association, the administrative agency responsible for processing the appeal, of its objection to the appeal claiming that the substantive issue is not subject to arbitration. The Union, however, agreed to participate in the arbitration process provided the hearing was bifurcated so that the issue of arbitrability could be addressed independently from the timeliness and substantive issues raised by the County in the appeal.

Applicable Contract Provisions

GRIEVANCE PROCEDURE

10. (a) Any grievance or dispute which may arise between the parties concerning the application or interpretation of this agreement shall be taken up in accordance with the procedure outlined below.

POSITION CLASSIFICATION

44. Classifications within the bargaining unit shall be in accordance with the following:

(a) New classifications or any existing classification in which the class specification is substantially changed, shall be evaluated by the County and the class allocated and a rate of pay established. The County shall notify the Union of the class allocation of the new or changed class specification and the rate of pay established therefore, and shall also provide a copy of the class specification to the Union for informational purposes. If the Union disagrees with the rate of pay so established, the County shall be so notified within fifteen (15) working days by the Union in writing; and such notification shall contain a report which includes a statement of justification for rejection of the allocation of the class to the rate of pay. The parties shall then commence collective bargaining on the rate of pay. If agreement is not reached within ten (10) working days, the Union, through the President of the Local, may submit the disputed wage rate to the Hearing Officer for determination which shall be final and binding on the County and the Union. For purposes of resolving issues that arise under paragraph 44(a), the Hearing Officer shall have authority to set the rate of pay.

(b) A classification review may be initiated by an employee requesting that the Personnel Director review the Employee's classification. The Department Director shall, within fifteen (15) working days, submit his/her comments, if any, to the Personnel Director. Any employee alleging improper classification based upon the duties and responsibilities as set forth in the class specification then effective, if not corrected, shall have the right through the Union to submit a grievance at Step Two of the Grievance Procedure provided an appeal has not been filed within three (3) months.

PRINCIPAL POSITIONS OF THE PARTIES

COUNTY: The County maintains that the PERB is without jurisdiction to either compel the County to appeal the decision of the Hearing Officer to arbitration, to implement the Hearing Officer's decision and/or make payment, thereunder. The County maintains that because an action is pending in Chancery Court to, inter alia, vacate the decision of the Hearing Officer, the PERB is without jurisdiction to process the unfair labor practice charge.

Concerning the underlying substantive issue, the County contends that it cannot have violated the Act, as alleged, by appealing the decision of the Hearing Officer to either the Court of Chancery or to arbitration.

The County further argues that consistent with prior PERB decisions the unfair labor practice petition should, at the very least, be deferred to the arbitration process as set forth in the negotiated grievance procedure.

UNION: The Union maintains that the broad grant of authority to the PERB set forth in 19 Del.C. §1301(3) of the PERA; the existence of the unfair labor practice provision set forth in Section 1307; and, the specific grant of authority set forth in Section 1308(b) to fashion remedial orders that include the specific authority to issue a cease and desist order appropriate affirmative action necessary to effectuate the policies underlying the PERA.

The Union argues that the language of Section 44(a) is clear and unambiguous insofar as it confers upon the Hearing Officer authority to establish the appropriate pay rate resulting from a substantial change in a job specification which is final and binding upon the parties. By failing to abide by the Hearing Officer's decision, the County has committed a per se violation of the duty to bargain in good faith as well as an attempt to interfere with rights guaranteed under the PERA. (Sections 1307(a)(1) and (a)(5), respectively)

ISSUES

1. Does the PERB have jurisdiction to process and decide the unfair labor practice charge?

2. If so, is there probable cause to believe the County has engaged or is engaging in conduct in violation of 19 Del.C. §1307(a)(1) and (a)(5), as alleged?

DISCUSSION

ISSUE NO. 1: The County offers no authority supporting its conclusion that the PERB lacks jurisdiction to process the unfair labor practice charge filed by the

Union. Nor has it petitioned the Court of Chancery to stay the processing of the complaint by the PERB.

The PERB has previously considered allegations of unilateral change in a mandatory subject of bargaining, including the grievance procedure, and concluded that such changes constitute a per se violation of the duty to bargain in good faith, as set forth in Section 1307(b)(2) of the PERA. Indian River Education Association, DSEA v. Bd. of Education, Del.PERB, ULP 90-09-053 (1991, PERB Binder 674).[3] Considering the broad grant of authority conferred upon the PERB by the §1301(3) of the PERA; the duty imposed upon the parties at §1302(d) to bargain over "terms and conditions of employment;" that "terms and conditions of employment" includes the "grievance procedure," (§1302(q)); that refusing to bargain in good faith constitutes an unfair labor practice, (§1307(b)(2)); and the specific grant of authority to the PERB to remedy unfair labor practices, (1308(b)), in the absence of an order from the Court enjoining the processing of the instant charge there is no basis justifying the PERB's refusal to process the charge.

ISSUE NO. 2: Appeal to Arbitration: The essence of the Union's argument that the Hearing Officer's decision is not appealable to arbitration is set forth at page 6 of its Opening Brief before the PERB, which provides:

> It is submitted that the language of §44(a) is clear and unambiguous, and the Hearing Officer's decision was to be final and binding including his decision on the wage rate. The status quo under the CBA as established by the language of §44(a) is clear and unambiguous. Anything less than prompt and complete implementation of the Hearing Officer's final and binding decision in the grievance filed by the President of the Local is a change in the status quo and is a per se violation of 19 Del.C. §1307(b)(1) and (2). There is no provision for the County to appeal the final and binding decision of a Hearing Officer under §44(a).

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[3] Prior PERB rulings decided under the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982), and/or the Police Officers and Firefighters Employment Relations Act, 19 Del.C. Chapter 16 (1986) are controlling to the extent that the relevant provisions of those statutes are identical to those of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994). Council 81, AFSCME, AFL-CIO v. State of Delaware, Div. of Highways, Del.PERB, ULP No. 95-01-111 (1995, PERB Binder 1279).

The impact of the "final and binding" provision of §44(a) upon the current dispute is not as clear as the Union argues. The initial grievance does not allege a singular violation of §44(a). It also alleges a violation §44(b). Not only does the grievance allege violations of both §44(a) and (b), the Hearing Officer refers to each section in both his statement of the issue and decision:

> ISSUE:
> Did the County violate Section 44(a),(b) of the Collective Bargaining Agreement when it denied a rate of pay increase for all County employees required to maintain a new Commercial Drivers License (CDL) as a condition of employment. If so, what shall be the remedy?
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> DECISION:
> In view of the fact that Local 459 filed a grievance alleging a violation of Section 44(a) and (b) of the Agreement, the decision of the Hearing Officer is final and binding and I am authorized to set the rate of pay.

For all practical purposes, §44(a) and (b) are separate, independent, and mutually exclusive provisions. Unlike §44(a), §44(b) addresses the subject of classification review based not on substantial change but upon the existing job responsibilities. Section 44(b) also establishes a procedure for processing disputes arising, thereunder, which is different from the procedure for processing disputes arising under §44(a).

The affidavit of Patricia Lutz, which accompanied the County's Answer to the unfair labor practice charge provides, in relevant part, at paragraph 6:

> On May 1, 1991, the County revised the class specifications of the Positions to comply with the requirements of the Uniform Commercial Driver's License Act ("Uniform Act") and the Commercial Motor Vehicle Act of 1986 ("CMVSA"). On that same date, the County, pursuant to the requirements of Subparagraph 44(a) of the CBA, informed the Union of the revisions.

Ms. Lutz' letter evidences the County's understanding that it was involved in §44(a) situation which presupposes the presence of substantial change. The County, however, has consistently maintained that the requirement for a CDL does not

constitute a substantial change in the job specifications of the affected classifications.

Section 44(a) authorizes only that a pay rate dispute resulting from a substantial change in job responsibilities be submitted to the Hearing Officer who has the authority to set the rate. The provision is silent as to the Hearing Officer's authority to determine the presence of substantial change. There is, therefore, arguably an issue concerning the authority of the hearing officer to determine the presence of substantial change as a prerequisite to ordering a rate adjustment pursuant to §44(a).

No grievance need be processed through the negotiated grievance procedure under §44(a). Rather, "...the Union, through the President of the Local, may submit the disputed wage rate to the Hearing Officer for determination which shall be final and binding on the County and the Union." This matter was not submitted directly to the Hearing Officer; rather, the course action undertaken by the Union was to file a grievance commencing at Step Two of the grievance procedure, as provided for by §44(b).

Under §44(a), the rate set by the Hearing Officer is final and binding and no appeal to a higher step of the grievance procedure, i.e., arbitration is permitted. Under §44(b), a grievance is filed commencing at Step Two of the grievance procedure which, in the absence of restrictive language, is appealable to the higher steps in the procedure, including arbitration.

It is apparent that to resolve the issue of the arbitrability of the Hearing Officer's decision requires a determination of whether the underlying facts raise an issue under §44(a) or §44(b) of the collective bargaining agreement.

The parties have agreed at §10(a) of the collective bargaining agreement that:

> Any grievance or dispute which may arise between the parties concerning the application and interpretation of this agreement shall be taken up in accordance with the procedure outlined below.

The procedure negotiated by these parties consists of the following: STEP ONE (Department Director or Acting Department Director); STEP TWO (Chief Administrative Officer or Acting Chief Administrative Officer-Director of Personnel or Acting Director of Personnel); STEP THREE (Hearing Officer); and STEP FOUR (Arbitration). (CBA, sections 12 - 15).

The PERB has previously declined to involve itself in matters of contractual interpretation, holding that the exclusive forum for resolving issues involving the interpretation and/or application of the collective bargaining agreement is the negotiated grievance procedure. The facts of this matter do not warrant a deviation from this position.

The Union has agreed to participate in the arbitration process so long as the issue of arbitrability is resolved prior to a consideration of the underlying issue and that process deserves to proceed. If the arbitrator rules that the decision of the Hearing Officer is not arbitrable the matter is closed. If, on the other hand, the arbitrator determines that the Hearing Officer's decision is arbitrable, he or she can then proceed to consider the issues raised by the County in its appeal.

Appeal to Chancery Court: The Action filed by the County with Chancery Court on March 29, 1996, occurred nine (9) days after the filing of the unfair labor practice charge by the Union on April 20, 1996, and is not, therefore, at issue before the PERB.

The Court of Chancery has in the past accepted jurisdiction to review a labor arbitration decision. Wilmington v. Wilmington Firefighters, Local 1590, Del. Supr., 384 A.2d 720 (1978). In accepting jurisdiction, the Court has adopted a narrow scope of review limiting consideration to questions involving whether the arbitrator's award "evidences a 'manifest disregard' for the terms of the contract" or "that the arbitrator's reasoning is 'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." State v. Council No. 81, AFL-CIO, Local

640, Del. Ch., C.A. 6097, Marvel, C. (May 20, 1981) See also State v. Public Employees Council 81, AFSCME, et. al., Del. Ch. C.A. No. 8462, Jacobs, V.C. (Jan. 7, 1987).

Whether the passage of the PERA creating the Public Employment Relations Board impacts the limited right to judicial review of a labor arbitration award and whether a final and binding decision issued by a Hearing Officer in a wage rate dispute pursuant to §44(a) is significantly different from a final and binding decision of an arbitrator so as to preclude judicial review of the former are questions properly addressed by the Court.

DECISION

Issue No. 1: The PERB has jurisdiction to process the instant unfair labor practice charge.

Issue No. 2: There is no probable cause to believe that an unfair labor practice has occurred and this charge is, therefore, dismissed.

IT IS SO ORDERED.

DATED: October 18, 1996

/s/Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Del. Public Employment Relations Bd.